On 28 March 1988, parties appeared in open court for further argument on application by the learned counsel for the defendant/appellant. The learned counsel essentially urged the court to exercise its revisionary power available under s 32 of the Courts of Judicature Act (Act 91). He cited three cases, namely, *Lim Siew Hong* v *Lee Kok Kim*,[2] *Tay Choon & Ors* v *Jeet Kaur*[3] and *Janagi* v *Ong Boon Kiat*,[4] where the respective High Courts dealt with the decisions of a Sessions Court and two Magistrate's Courts and not the decision of a senior assistant registrar. The question was whether the term 'subordinate court' as defined in the Courts of Judicature Act can also include the registrar sitting in chambers. The definition of 'subordinate court' in the said Act must, in my view, by necessary implication mean any of those established under s 3 of the Subordinate Courts Act 1948 which reads:

> 3.(1) (repealed)
> (2) There shall be established the following subordinate courts for the administration of civil and criminal law:
> (a) Sessions Courts;
> (b) Magistrate's Courts; and
> (c) in West Malaysia only, Penghulu Courts.

Clearly therefore a subordinate court cannot include a registrar or a senior assistant registrar sitting in chambers. The jurisdiction of a registrar sitting in chambers is found in O 32 r 9 of the Rules of the High Court 1980. His decision is appealable to a judge in chambers by way of O 56 r 1. However, nowhere in the Rules is a revisionary power provided for. Perhaps its absence may be easily explained in that to bring a matter on appeal does not require an elaborate procedure unlike that applicable to decisions of a subordinate court proper. Also, an appeal is a rehearing of the whole matter and every aspect of it can be satisfactorily dealt with and disposed of and so was this matter before me. In the circumstances, I confirmed the decision I made earlier.

Order accordingly.

Solicitors: *Vendargon & Partners*; *Peter Lai & Rajoo.*

Reported by *Wong Kim Fatt*

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor

HIGH COURT (KUALA LUMPUR) – APPLICATION FOR EXECUTION NO 443 OF 1985
SHANKAR J
8 JUNE 1988

Civil Procedure – Summary judgment – Execution – Writ of seizure and sale – Household goods seized – Claim by wife of defendant – Interpleader summons – Allegations of claimant not contradicted – Claim of harta sepencarian – Application for stay of execution refused – Appeal – Execution on property of third party – Rules of the High Court 1980, O 17 & O 35

Family Law – Harta sepencarian – Applicability to household goods enjoyed in common by spouses in matrimonial home – Law Reform (Marriage and Divorce) Act 1976, s 76

In this case summary judgment had been obtained by the plaintiff against the defendant for the sum of S$120,689.02. The plaintiff levied execution by way of a writ of seizure and sale and some household goods were seized at the premises alleged to be the residence of the defendant. The wife of the defendant claimed that the goods had been bought jointly and severally by her and her husband but said she was unable to produce receipts immediately. The sheriff took out an interpleader summons. At the hearing the claimant produced some receipts and the matter was adjourned to enable her to produce more receipts. The plaintiff agreed to release 11 items only. At the adjourned hearing the claimant gave oral evidence. The registrar on the material before him dismissed her claim. The goods were subsequently sold. She appealed to the High Court.

Held, allowing the appeal:

(1) Where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted. The claimant's oral evidence at the hearing that she was the sole owner of the goods was also unchallenged.

(2) The plaintiff in this case had produced no evidence of the defendant's title in the goods.

(3) Where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales. The plaintiff had produced no evidence whatsoever.

(4) The doctrine of harta sepencarian applied to all property acquired in the course of a marriage out of the joint resources or the joint efforts of the spouses. In the absence of clear evidence that the property was the sole property of one spouse, both have an equal share.

(5) Where a wife is in possession of chattels in the matrimonial home and she gives sworn testimony that they were hers, an execution creditor cannot be held to have displaced her claim merely by producing evidence that the husband was living in the same home and is in receipt of good income.

(6) This is not just a case of wrongful irregular execution. It was an execution levied by the plaintiff on goods which have been proved to be the property not of the defendant's but a third party against whom the plaintiff has no judgment. Such wrongful seizure is an actionable trespass and the remedy is in damages.

(7) The decision of the registrar must be set aside and the plaintiff be ordered to pay all damages suffered by the claimant as a result of the seizure and sale.

Cases referred to

1 *Tynte* v *Buller* (1854) 23 LJ Ch 504; 2 WR 309 (refd)
2 *Roberts* v *Ummi Kalthom* [1966] 1 MLJ 163 (folld)
3 *Tan Teng* v *SSTKR Karuppan Chettiar* [1938] MLJ 49 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 76
Rules of the High Court 1980 O 17 r 11, O 35

K Ananthan for the plaintiff/respondent.
PS Gill for the claimant/appellant.

Cur Adv Vult

Shankar J: What right has a wife against her husband's creditors in respect of household goods in the home in which she resides? The answer to this question is of paramount importance to every married woman in Malaysia.

The plaintiff is a Singapore company. The defendant is described in the evidence as a 'foreigner'. On 7 March 1985, the plaintiff obtained summary judgment against him for S$120,689.02. Then it levied execution by issuing a writ of seizure and sale against the defendant 'of No 9, Lorong Taman Pantai Satu, Bukit Pantai, Kuala Lumpur' (hereinafter referred to as 'the premises').

The registrar issued the writ. In it the defendant is stated in the footnote by the plaintiff's solicitors as residing 'at No 9, Lorong Taman Pantai Satu, Bukit Pantai, Kuala Lumpur and elsewhere in the Federal Territory and Selangor'.

On 13 September 1985, the sheriff entered the premises and seized the movable property therein ('the goods'). He listed them under 32 items separated under the heads of the rooms in which they were found. At this juncture I would merely state that taken singly or together the entire movable property consisted of furniture, fittings and kitchen equipment, which can conveniently be described as household goods.

In the proclamation of sale which followed, the licensed auctioneer described these goods as 'belonging to the defendant'. The auction was fixed for 14 October 1985.

On 10 October 1985, the defendant's wife Nor Aziha bte Ali ('theclaimant') filed an affidavit claiming the goods. In it she averred that she had been married to the defendant for over 18 years, that the goods had been bought jointly and severally by her and her husband, that she was unable to produce receipts immediately but was willing to testify to that effect, and finally contended that the goods belonged to her on the principle of 'harta sepencarian'. Notice was simultaneously given to the plaintiff that all the goods were claimed by her.

The sheriff accordingly took out an interpleader summons. The plaintiff filed notice that it disputed the claim. The summons was accordingly fixed for hearing on 25 October 1985.

By that date the claimant had located some receipts and the matter was adjourned to 4 November 1985. On 1 November 1985, the claimant filed an affidavit exhibiting all the receipts she had located thus far. She explained that when she filed her earlier affidavit she was still in a state of shock caused by the seizure of her goods and the threatened auction. The documentary evidence she produced ran into more than 100 pages of photostated material. They were bills, cheques, correspondence and other accounting documents all of which were put forward to support her claim. Unfortunately, the industry of the claimant's solicitors did not then extend to an itemized cross-referencing of each exhibit to each item of the goods. Nor was the affidavit even paginated. The exhibits were just lumped together and thrown at the head of the plaintiff's solicitors and the court.

It was evidently enough to satisfy the plaintiff's solicitors that the claimant was serious and the hearing was adjourned to permit the parties to go to the store where the goods were being detained. Here the plaintiff was persuaded to release 11 items only. I infer it was satisfied that some of the receipts produced tallied with these items. But it hung on to the remainder.

On 18 November 1985, the interpleader summons came up for hearing again. The claimant now had two affidavits on file. The plaintiff had not filed any affidavit in rebuttal. The claimant then gave oral evidence on oath and was cross-examined by the plaintiff's solicitors. The plaintiff did not give any evidence in rebuttal. The submissions spilled over to the following day by which time the claimant had found some more documents directly linking her claim to specific items of the said goods. She sought to put these in but the registrar refused to let her do so. On the material before him he adopted a summary approach and dismissed the claim.

The claimant then appealed to this court. Her application for stay of execution was dismissed and the remaining goods were sold off on 6 December 1985 at the public auction for $3,364.

The plaintiff attached these goods and had them sold on the basis that the goods belonged to the defendant. But what evidence was there to support that contention? None whatsoever except the say-so of the plaintiff's solicitors in the writ of seizure and sale. The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations

which are not contradicted are deemed to be admitted: see *Tynte* v *Buller*.[1] At the hearing, the claimant's oral evidence that she was the sole owner of the goods was also unchallenged.

In most such cases, the basis of the creditor's right to attach arises from the fact that the circumstances are such that it is reasonable to presume that the defendant is the reputed owner of the goods. Possession is said to be nine-tenths of the law! So if a house is in the exclusive occupation of the defendant, his execution creditor may have some justification to attach. But where a number of persons are in simultaneous occupation of a house, as for example, one occupied by several wage-earning members it would be imprudent to assume that everything in the house belongs to the registered owner or even to the nominal head of the family. In the present case there was no evidence whatsoever before the registrar that the defendant was the owner of the premises or even that he was residing there at any material time. Consequently the plaintiff had not even laid the foundation for any presumptive ownership in the defendant when the goods were seized.

Instead of holding that the claimant's affidavits and viva voce evidence were unchallenged and uncontradicted and therefore holding in her favour, the registrar dismissed her claim. This he was able to do by holding that the claimant had not proved to his satisfaction that the goods were hers. In the absence of any evidence whatsoever from the plaintiff, this finding cannot be sustained.

But this case raises other legal issues which goes to the heart of every Malaysian matrimonial home.

The claimant's unchallenged evidence was that she came from a wealthy family. She was a person of independent means before she married the defendant in 1966. Thereafter she had a printing company with an income of about $1,500 per month. The goods attached had been acquired over a period of 18 years. The only material the plaintiff elicited in cross-examination was that during the marriage the defendant was also employed but his actual earnings were not known. The point is that the plaintiff produced no evidence whatsoever of title to the goods in the defendant.

At this juncture, I would observe that it must be self-evident that it would be no easy matter for a housewife to produce at the drop of the sheriff's hat, individual receipts for each item of household furniture acquired over a lifetime of wedlock. If the registrar's approach is correct, then it behoves every Malaysian housewife to beware and immediately start a special file of receipts for household goods.

The wonder of this case is that the claimant did produce a mass of material before the hearing to support her claim. It is the opinion of this court that even though they had not been properly indexed and cross-referenced, the material produced corroborated her claim that the goods were hers.

The plaintiff's complaint on the first day's hearing was that the receipts had not been individually linked to each of the goods. But on the second day when her counsel sought to do so, and supported this with an affidavit, leave was refused. The claimant had just given sworn evidence that the goods were hers; and in the absence of any evidence to the contrary, the registrar should have permitted her a reasonable opportunity to link the receipts she had found to the goods in question. The grounds for the objection by plaintiff's counsel was delay but in such a case where a serious challenge had been mounted, it was not a proper exercise of judicial discretion to preclude her from proving her case to the extent required by the registrar.

The registrar gave four grounds why he dismissed the claim and I will now deal with them one by one.

Firstly, he said that she had not discharged the burden of proof on a balance of probabilities. He added that the mere fact that she said she had bought most of the goods was not enough. With respect to the registrar, where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales. The plaintiff had produced no evidence whatsoever.

Secondly, the registrar held that the credibility of the claimant was in doubt because she did not explain the details of each of the items she was claiming. This omission does not go to credibility. (She was unshaken in cross-examination.) It goes to the sufficiency of the evidence. The opportunity to relate the documents to the articles, when requested, was refused. The point is that the evidence was there, and in the submissions before me the receipts for the items claimed have been identified (see para 11 of the claimant's written submission for details). In their written submission (at para 3.5), the plaintiff's solicitors have picked out four invoices (which are not in the claimant's name) to substantiate their contention that her evidence on them cannot be accepted. But the fact is that she did explain her claim item by item in relation to the goods list (see encl 43). She was not cross-examined on this affidavit at all. Besides, the third and fourth invoices picked up by the plaintiff's solicitors (ie invoices 11539 and 1528) have no direct connection with any of the goods actually seized.

The third ground is pure law. The claimant's solicitors submitted that where household goods are enjoyed in common by spouses in a matrimonial home, then by virtue of 'harta sepencarian' the wife is entitled to an equitable half share of the property. The plaintiff's solicitors submitted that this principle only applied in divorce cases or upon distribution of a deceased's estate. The

registrar found the claimant's reliance on the adat absurd and illogical. But with respect to all concerned, the matter should have been viewed in the following perspective. The plaintiff's solicitors were contending that all the goods were the sole property of the defendant. They were also saying that despite the mass of documentary evidence and her sworn testimony, the claimant had not proved the goods were hers. It is in response to such a contention that the claim of 'harta sepencarian' must be viewed. The parties were Muslims. The doctrine in my view applied to all property acquired in the course of a marriage out of their joint resources or the joint efforts of the spouses. Put loosely, in the absence of clear evidence that the property was to be the sole property of one spouse, both have an equal share. That title in my view prevails throughout the marriage. What would be absurd and illogical is to contend that the spouse's title only arises upon a divorce or death. If on the material before the court the proper finding was that there was no clear evidence from which it could be inferred that the goods belonged exclusively to one or the other of the spouses, then the proper conclusion on the basis of the adat was that it belonged to them both. I would respectfully adopt the judgment of HRH Sultan Azlan Shah (Raja Azlan Shah J as he then was) in *Roberts* v *Ummi Kalthom*[2] as applying in such cases. Spouses not of the Muslim faith may take note of s 76 of the Law Reform (Marriage and Divorce) Act 1976 which enunciates the same principle.

This brings me to the last ground on which the registrar dismissed this claim, namely, that there was no evidence before him to raise the 'presumption'. It is not clear to me which presumption he had in mind. Mr Gill in this appeal has argued that the equitable presumption of advancement applies equally in this case, ie that if a husband buys property and puts it in the name of his wife the law will presume in the absence of evidence to the contrary that he meant to give it to her absolutely. Where a wife is in possession of chattels in the matrimonial home and she gives sworn testimony that they were hers, I hold that an execution creditor cannot be held to have displaced her claim merely by producing evidence that the husband was living in the same house and is in receipt of a good income.

That, in the end result, is what this case came to, with the added gloss that there was no evidence whatsoever from the plaintiff that the house was the defendant's or that he was living there at the material time, or even that he had paid for the goods.

In the result, I allow this appeal and set aside the decision of the senior assistant registrar. On the material before me I hold that the proper and only finding was that the claimant was the owner of these goods and they should have been released to her with costs.

But the goods have been sold and the plaintiff's counsel submits that justice would be satisfied by making over to her the sum of $3,364 realized at the auction. 17 *Halsbury's Laws of England*, 4th Ed, para 461 is relied upon for this proposition.

With respect to the plaintiff's solicitors, this seems to be adding insult to injury. This is not a case of just a wrongful irregular execution. It was an execution levied by the plaintiff on goods which have been proved to be the property not of the defendant but a third party against whom the plaintiff had no judgment. Such a wrongful seizure is an actionable trespass and the remedy is in damages: see *Tan Teng* v *SSTKR Karuppan Chettiar*.[3]

In passing, there is one other matter I must touch upon. Between attachment and actual sale, the watchman's wages and incidental expenses will inevitably be mounting day by day. So it is to the execution creditor's benefit to have an early sale especially in cases where the amount which is ultimately recovered may not be enough to cover costs. On the other hand, it could be unreasonable to expect a claimant to produce at short notice, documentary evidence to support a claim for goods which have been in long possession. And there may be serious disputes of fact or complicated questions of law involved. Where such considerations arise, summary disposal of the claim could be totally inappropriate. Instead, consideration should be given to the necessary directions for a proper trial of the issues.

To conclude, I now order that the decision of the registrar be and is hereby set aside, and the costs both of the proceedings in the court below and before me be taxed and paid by the plaintiff to the claimant.

I further order that the plaintiff do pay all damages suffered by the claimant as a result of this seizure and sale, such damages to be inquired into and assessed on a date to be fixed. I also direct in accordance with O 17 r 11 of the Rules of the High Court that O 35 shall apply as to the damages to which the claimant is entitled.

Since any damages recovered by the claimant must of necessity exceed the $3,364 released at the auction and I have found it proved that the goods belonged to her, I order that this sum be paid over to her forthwith by the plaintiff towards satisfaction pro tanto of her claim with interest thereon at 8% pa from 13 September 1985 to the date of payment. The proceeds of the auction which have been deposited in the registry shall remain there until such time as the trial is concluded and then disposed of in such way that the court may direct.

Finally, I give the parties liberty to apply for all necessary directions for trial.

Order accordingly.

Solicitors: *Skrine & Co*; *Gill & Tang*.

Reported by *Prof Ahmad Ibrahim*